

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. POTTS, D.D.S., and
THE AMERICAN ACADEMY OF IMPLANT
DENTISTRY,

Plaintiffs,

v.

KATHLEEN HAMILTON, in her
Official Capacity as Director,
California Department of
Consumer Affairs; CYNTHIA
GATLIN, Executive Officer,
California Dental Board; and
ALAN H. KAYE, D.D.S.,
President; Public Member; LA
DONNA DRURY-KLEIN, R.D.A.,
Secretary; DAVID I. BARON,
Public Member; NEWTON GORDON,
D.D.S., Member; LAWRENCE
HYNDLEY, D.D.S., Member;
PATRICIA OSUNA, R.D.H., Member;
GEORGE SOOHOO, D.D.S., Member;
ARIANE TERLET, D.D.S., Member;
and CHESTER YOKOHAMA, D.D.S.,
Member, in their Official
Capacities with the California
Dental Board,

Defendants.

CIV-S-03-0348 DFL-DAD

MEMORANDUM OF OPINION
AND ORDER

Plaintiffs Michael Potts, D.D.S. and the American Academy of
Implant Dentistry ("AAID") filed this § 1983 challenge to the

1 constitutionality of a California statute restricting the
2 advertisement of dental speciality credentials. The court
3 granted summary judgment in favor of plaintiffs on September 8,
4 2004. The court also granted plaintiffs' request for declaratory
5 and injunctive relief on February 7, 2005, enjoining defendants
6 from enforcing the statute against plaintiffs and similarly
7 situated AAID members. Final judgment was entered in favor of
8 plaintiffs on February 16, 2005.

9 Plaintiffs now move for attorneys' fees and litigation
10 expenses under 42 U.S.C. § 1988 as the prevailing party in their
11 lawsuit, requesting \$337,667 in attorneys' fees and \$58,121.85 in
12 litigation expenses. (Mot. at 8.) Additionally, plaintiffs have
13 separately filed a bill of costs for \$19,617.42. Defendants
14 concede that plaintiffs are entitled to attorneys' fees and
15 certain litigation expenses, but challenge the amounts requested.
16 Defendants also challenge some of the listed items on the bill of
17 costs.

18 I.

19 A. Attorneys' Fees

20 The court uses the "lodestar" method for determining the
21 appropriate attorneys' fee award. Gates v. Deukmejian, 987 F.2d
22 1392, 1397 (9th Cir. 1992). Under this approach, the court
23 multiplies a reasonable hourly rate by the number of hours
24 reasonably expended in the litigation. Id. There is a strong
25 presumption that the lodestar amount is reasonable. Harris v.
26 Marhoefer, 24 F.3d 16, 18 (9th Cir. 1994).

1 1. Reasonable Rate

2 Plaintiffs seek an award of \$337,667 in attorneys' fees for
3 the 1,321.33 hours their legal team spent on the case. (Mot. at
4 2, 8.) Plaintiffs had two principal attorneys: Frank Recker, an
5 attorney at Frank Recker and Associates Co., L.P.A. in Florida,
6 and Ann Taylor Schwing, local counsel at McDonough Holland &
7 Allen. (Id. at 3.) In addition, several associates and
8 paralegals assisted on the case. Plaintiffs' documentation
9 reveals that plaintiffs incurred \$73,142 in attorneys' fees from
10 Schwing's firm, and \$225,676.25 in fees from Recker's firm, for a
11 total of \$298,818.25 in attorneys' fees. (Reply at 9.) These
12 fees were calculated using Schwing's and Recker's historic
13 billing rates, which were \$250, \$275, and \$300 for Schwing and
14 \$275 and \$325 for Recker. (Schwing Decl. at 3; Recker Decl. at
15 5.) AAID paid these fees as they were billed. (Recker Decl. at
16 5.) However, plaintiffs request compensation for their
17 attorneys' fees at Recker's and Schwing's current rates - - \$325
18 for Recker and \$300 for Schwing - rather than their historic
19 rates, resulting in the current request for \$337,667 in
20 attorneys' fees. (Schwing Decl. at 9.)

21 Defendants do not challenge the requested rates for any of
22 the associates or paralegals who assisted on the case.¹ However,
23 they dispute the rates requested by Schwing and Recker on several
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25 ¹ There does not appear to be any difference between the
26 historic and current rates for the paralegals and other
attorneys, as plaintiffs have only requested the current rates
for Schwing's and Recker's time.

1 grounds. First, they argue that Schwing's and Recker's rates
2 should be based upon their historic rates, rather than their
3 current rates. (Opp'n at 4-5.) The court agrees.

4 The Supreme Court has held that courts have discretion to
5 compensate prevailing parties for the length of time the
6 successful party's attorney has had to wait to receive fees
7 (i.e., for the lost use of the funds and the effects of
8 inflation) by awarding fees at the attorney's current, rather
9 than historic, rates. Missouri v. Jenkins, 491 U.S. 274, 284,
10 109 S.Ct. 2463 (1989); Gates, 987 F.2d at 1406-07. Here,
11 plaintiffs' attorneys did not experience a long delay in
12 receiving their funds; rather, AAID paid the legal bills as they
13 became due. (Recker Decl. at 5.) Nonetheless, plaintiffs ask
14 the court to apply current rates in this case because AAID was
15 denied the use of the funds for the intervening years or months.
16 (Mot. at 5.)

17 However, the cases in which courts have applied the
18 attorneys' current rates are significantly distinguishable from
19 the present case, in that they all involve complex civil rights
20 litigations where plaintiffs' attorneys received compensation
21 several years after their services were rendered. See Jenkins,
22 491 U.S. at 284 n.6 (major school desegregation case where
23 attorneys had to wait over three years before receiving
24 compensation); Gates, 987 F.2d at 1407 (complex civil rights
25 litigation where attorneys waited more than three years to be
26 compensated). Plaintiffs have not cited, nor could the court

1 find, a case where a court has applied the current attorneys'
2 rate in a situation similar to this - - to compensate a client
3 for having paid his attorneys' fees as billed. Accordingly, the
4 court finds that Schwing and Recker should be compensated at
5 their historic rates, not at their current rates.

6 Second, defendants argue that Schwing's historic rates are
7 higher than the prevailing Sacramento rate for similar work by
8 attorneys of like skill. (Opp'n at 3-4.) The court disagrees.
9 In light of her years of experience, standing in the legal
10 community, credentials, and skill, the requested rates are
11 reasonable for the Sacramento community. The case cited by
12 defendants, Peters v. Winco Foods, Inc., 320 F.Supp.2d 1035,
13 1042-43 (E.D.Cal. 2004), does not suggest otherwise. In Peters,
14 the court awarded rates of \$240 for work performed in 2003 and
15 \$260 for work performed in 2004. Id. However, unlike Schwing,
16 the attorney in Peters was a recent law school graduate with
17 limited experience. (Reply at 3-4.) In light of Schwing's
18 experience and credentials, the court finds her historic rates
19 reasonable.

20 Finally, defendants assert that Recker's requested rates
21 also exceed the prevailing Sacramento rate for an attorney of his
22 skill level, arguing that Recker should be paid at the same rate
23 as Schwing. (Opp'n at 4.) However, Recker brought special
24 expertise to this litigation by virtue of his extensive
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1 background in dentistry.² (Reply at 4.) In light of his
2 credentials and special expertise, the court finds Recker's
3 requested historic rates to be reasonable for the Sacramento
4 community.

5 2. Reasonable Hours Expended

6 Defendants also raise challenges to several of plaintiffs'
7 documented time entries, none of which is persuasive. (Opp'n at
8 5-6.) First, defendants argue that certain secretarial services
9 performed by associate attorneys should not be compensated
10 because they are overhead expenses. (Id. at 6.) However, these
11 tasks amount to at most a few hours out of the more than 1,300
12 hours spent on this case. (Reply at 6.) Moreover, several of
13 the time entries defendants identify consist primarily of non-
14 secretarial tasks. (Id.) In light of the reasonableness of the
15 overall hours expended on this case, the court declines to reduce
16 the fee award for these minimal, administrative tasks.

17 Second, defendants complain about forty billed hours for
18 which Recker used an associate to summarize depositions, as
19 opposed to a paralegal. (Opp'n at 6.) Courts have compensated
20 attorneys for reviewing and summarizing depositions where the
21 time spent is reasonable. See Marbled Murrelet v. Pacific Lumber
22 Co., 163 F.R.D. 308, 323-24 (N.D.Cal. 1995) (finding it
23 reasonable for senior level attorney to review and summarize
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26 ² Recker has a Doctorate in Dentistry, in addition to his
law degree, and has been a practicing dentist in three different
states. (Reply at 4.)

1 depositions and awarding fees for such entries where attorney had
2 small staff); Corder v. Gates, 688 F.Supp. 1418, 1422 (C.D.Cal.
3 1988) (awarding fees for time lead counsel spent reviewing and
4 summarizing depositions where overall hours billed were
5 reasonable), rev'd on other grounds, 947 F.2d 374 (9th Cir.
6 1991). Here, Recker's use of an associate to review the
7 depositions was reasonable, given that he did not have a
8 paralegal on staff at that time. (Reply at 7.) Moreover, the
9 forty hours spent reviewing the depositions was not excessive.
10 Accordingly, the court finds these time entries are compensable.

11 Third, defendants assert it was unreasonable for Recker to
12 bill at his full rate for travel time. (Opp'n at 6.) However,
13 several cases have held that reasonable travel time by the
14 attorney during the course of the litigation may be compensable
15 at full market rates. See U.S. v. City & County of San
16 Francisco, 748 F.Supp. 1416, 1422 (N.D.Cal. 1990), aff'd in
17 relevant part Davis v. City and County of San Francisco, 976 F.2d
18 1536, 1543 (9th Cir. 1992). Defendants do not contend that the
19 travel was unrelated to the litigation; accordingly, it is
20 appropriate to compensate Recker for his travel time at the
21 requested full rate.

22 Finally, defendants complain that some of the time entries
23 were too vague to determine whether the time was reasonably
24 expended. (Opp'n at 6.) Specifically, defendants complain about
25 several entries labeled "review emails." (Id.) The amount of
26 time billed for these entries is minimal, with each entry

1 covering a maximum of 30 minutes. The court finds the
2 descriptions provided for these entries are sufficiently
3 specific.

4 Accordingly, the court finds the documented hours for
5 plaintiffs' attorneys are reasonable.

6 3. Conclusion

7 The court awards plaintiffs attorneys' fees in the amount of
8 \$298,818.25. As described above, this award compensates
9 plaintiffs for the 1,321.33 documented hours plaintiffs' legal
10 team spent on the case at their attorneys' historic rates.

11 B. Litigation Expenses

12 Plaintiffs request \$58,121.85 in litigation expenses,
13 consisting primarily of expenses for legal research, travel, and
14 expert witness fees. Defendants do not challenge the legal
15 research and travel expenses. However, they argue that
16 plaintiffs are not entitled to the \$50,675 requested for expert
17 witness fees because 42 U.S.C. § 1988 does not provide for the
18 award of such fees in excess of the limits imposed by 28 U.S.C.
19 §§ 1821 and 1920. (Id.)

20 Expert witness fees are recoverable as part of an attorneys'
21 fee award only if they are authorized by explicit statutory
22 authority. W.Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 87,
23 111 S.Ct. 1138 (1991). Following Casey, Congress expressly made
24 expert witness fees recoverable as part of attorneys' fees in an
25 action brought to enforce a provision of §§ 1981 and 1981(a). 42
26 U.S.C. § 1988(c). Here, plaintiffs brought their suit under §

1 1983, not § 1981. Accordingly, plaintiffs are limited to
2 recovering only those expert witness fees allowed by 28 U.S.C. §§
3 1821 and 1920.³ See Padro v. Commonwealth of Puerto Rico, 100
4 F.Supp.2d 99, 109 (D.P.R. 2000) (citing cases).

5 Section 1920(6) provides for the compensation of
6 court-appointed experts. Because plaintiffs' experts were not
7 court appointed, they can only receive basic witness fees under
8 28 U.S.C. § 1821. See 28 U.S.C. § 1920(3). Section 1821(b)
9 limits witness fees to "an attendance fee of \$40 per day" at a
10 deposition or a trial, plus other travel expenses where
11 applicable. Here, plaintiffs have not indicated that their
12 experts appeared at either a deposition or a trial. Accordingly,
13 plaintiffs are not entitled to any of their requested expert
14 witness fees. The court awards plaintiffs their remaining,
15 requested litigation expenses, totaling \$7,446.85.

16 C. Bill of Costs

17 Defendants object to several of the costs plaintiffs include
18 within their bill of costs. First, they challenge the inclusion
19 of a \$1,400 charge for payments to defendants' two expert
20 witnesses for the taking of their depositions. (Bill of Cost
21 Objections at 2.) For the reasons described above, defendants
22 are correct, and plaintiffs are limited by §§ 1821 and 1920 to
23 \$80 for the two days of deposition testimony by these witnesses.
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25 ³ Plaintiffs argue that, despite the statutory language and
26 the applicable case law, the court still has discretion to award
expert witness fees. (Reply at 8.) However, this argument is
foreclosed by Casey and Padro.

1 See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437,
2 445, 107 S.Ct. 2494 (1987).

3 Second, defendants object to the \$8,974.91 listed under the
4 category of "other costs," representing the travel and related
5 expenses for plaintiffs' attorneys to attend depositions in this
6 case.⁴ (Bill of Cost Objections at 2.) While conceding that
7 these expenses are compensable, defendants contend that they
8 should have been requested as part of plaintiffs' motion for
9 attorneys' fees, rather than in plaintiffs' bill of costs. (Id.)
10 Plaintiffs do not challenge defendants' argument, but ask that,
11 if the court finds these expenses not recoverable as costs, they
12 be allowed to seek recovery of them as part of their attorneys'
13 fees motion. (Reply to Bill of Costs Objections at 2; Reply to
14 Attorney Fees Opp'n at 8.)

15 The court agrees with defendants that these costs are more
16 properly recovered as part of an attorneys' fees motion; section
17 1920 does not specifically provide for travel expenses and courts
18 have accordingly found them not compensable as part of a bill of
19 costs. See Yasui v. Maui Elec. Co., Ltd., 78 F.Supp.2d 1124,
20 1130 (D.Haw. 1999). Accordingly, the court awards these costs to
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23 ⁴ Plaintiffs originally requested \$9,204.52 under this
24 category of "other costs." However, plaintiffs withdrew their
25 request for two of the specific charges listed - - (1) a charge
26 for on-command movie fees (\$38.97), and (2) an unexplained
business center cost of \$ 190.64 - - after defendants objected to
them. (Reply to Objections to Bill of Costs at 2-3; Reply to
Attorneys Fee Opp'n at 8.). Accordingly, they reduced their
requested travel expenses costs to \$8,974.91. (Reply to Attorney
Fees Opp'n at 8.)

1 plaintiffs as part of plaintiffs' attorneys' fees motion,
2 bringing plaintiffs' "litigation expenses" award to \$16,421.76.

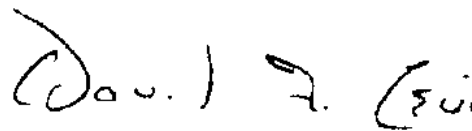
3 Defendants do not object to the remainder of plaintiffs'
4 bill of costs, and the court finds these costs appropriate. The
5 court, therefore, awards plaintiffs \$9,012.90 for their bill of
6 costs.

7 D. Conclusion

8 Based on the above discussion, the court awards plaintiffs
9 \$298,818.25 in attorneys' fees and \$16,421.76 in litigation
10 expenses. The court also awards plaintiffs \$9,012.90 in costs.
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12 IT IS SO ORDERED.

13 Dated: 6/17/2005
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18 DAVID F. LEVI
19 United States District Judge
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